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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 622

HONORABLE WALTER J. LA BUY,

Petitioner,

vs.

HOWES LEATHER COMPANY, INC., and MONTGOMERY WARD & CO., INC.,

Respondents.

HONORABLE WALTER J. LA BUY,

Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,

Respondent.

BRIEF FOR PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The order sought to be reviewed was entered in a consolidated case, comprising two original proceedings for mandamus filed in the Court of Appeals for the Seventh Circuit. The opinion of the Court majority, as well as that of the dissenting Judge, is reported at 226 F. 2d 703.

JURISDICTION

The order of the Court of Appeals was entered on October 13, 1955. A petition for rehearing and for rehearing *en banc* was denied on November 17, 1955. The jurisdiction of this Court is invoked pursuant to 28 USC 1254, petition for certiorari being filed January 11, 1956. Certiorari was granted by this Court February 27, 1956.

STATUTE AND RULE INVOLVED.

The pertinent provision of the "All Writs Act" (28 USC 1651(a)) reads as follows:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The pertinent Sections of the Judicial Code (28 USC 1291, 1292) read as follows:

Section 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1292. Interlocutory decisions.

"The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dis-

solving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting."

Rule 53 (b) of the Federal Rules of Civil Procedure reads as follows:

"(b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the "All Writs Act" (28 USC 1651 (a)) confers jurisdiction upon the Courts of Appeal to review by writ of mandamus a District Court's interlocutory and discretionary order of reference to a Master in Chancery.

2. Whether the issuance of a writ of mandamus is proper under the "All Writs Act" to revoke and annul an order of reference entered by a District Court acting within its jurisdiction merely because the majority of the Court of Appeals concluded the reference to be er-

roneous under Rule 53 (b) of the Federal Rules of Civil Procedure.

3. Whether the referral of a non-jury case to a Master for trial which the District Court found was necessitated by the unusual complexity of the factual and legal issues, by the length of time required to hear and determine such case, by the matters of account inherent in resolving the issues of liability, and by the extreme congestion of his trial calendar, was authorized by Rule 53 (b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

Nature of the Case.

The two consolidated cases now before this Court were commenced as two original petitions for mandamus filed with the Court of Appeals for the Seventh Circuit. The moving parties in No. 11472 in the Court of Appeals (R. 1-4) (Howes Leather Co., Inc. and Montgomery Ward & Co., Inc. v. The Hon. Walter J. LaBuy) were two of multiple defendants in a case pending before the respondent District Judge (*Rohlfing, et. al.* v. *Cats Paw Rubber Co.*, No. 50 C 229, N.D. Ill., E.D.) which had been referred to a Master in Chancery for Trial. The moving party in No. 11473 in the Court of Appeals (R. 210-213) (Howes Leather Co., Inc. v. The Hon. Walter J. LaBuy) was one of multiple defendants in a companion case also pending before the same District Judge (*Shaffer, et al.* v. *U. S. Rubber Co., et al.*, No. 50 C 844, N.D. Ill., E.D.), which had been similarly referred to a Master for trial at the same time as its companion case. The two petitions for mandamus, without the assertion of any grounds to sustain them, asked the Court of Appeals to

compel vacation (R. 3, 212) of the orders of reference previously entered in the two cases pending in the court below. The District Judge (petitioner here) filed detailed answers to the two petitions for mandamus, setting forth the exceptional conditions which impelled him to refer the cases to a Master (Answer in case 11472 [Rohlfing] R. 5-15; in case 11473 [Shaffer] R. 215-219). Attached to the answers as exhibits thereto were certain documents and proceedings filed or had in the court below, which show, among other things, the complex and elaborate character of the litigations which had been referred to the Master. (Exhibits to Answer Case 11472 [Rohlfing] R. 24-210; Exhibits to Answer Case 11473 [Shaffer] R. 220-310). None of the allegations of the answers, and none of the exhibits, were challenged in the court below by any pleadings; and the case was submitted and decided on said answers.

The Referrals to the Master.

The cases (still pending in the District Court) which give rise to this dispute, *Rohlfing, et al.* v. *Cats Paw Rubber, et al.*, and its companion case, *Shaffer, et al.* v. *U. S. Rubber Co., et al.*, were filed in 1950. (R. 29, 30; 22, 223).

In the *Rohlfing* case, eighty-seven plaintiffs (shoe repair men) sued twenty-five defendants (manufacturers and wholesalers of rubber goods, leather goods, and shoe polish, as well as department and chain store users). The proceedings had in the case are so numerous that the docket entries alone, as kept by the District court clerk (R. 30-57) filled twenty-eight large docket pages, up to the time the mandamus proceedings were filed. Motions relating to the pleadings; motions for summary judgment and for partial summary judgment; motions regarding service of process; motions to add or dismiss parties; motions relating to discovery procedures; motions re-

garding depositions; motions and objections regarding interrogatories, and other matters, occupied the court and the parties for several years. (R. 30-57) Nearly all of these matters were briefed. (R. 30-57) At least five written opinions were filed in the *Rohlfing* case by the District Judge. (June 18, 1951, R. 34; July 8, 1952, R. 38; Jan. 29, 1954, R. 47; April 28, 1954, R. 49; Dec. 10, 1954, R. 53) Plaintiffs finally filed their second amended complaint (R. 59-130), consisting of 104 separate counts (one for each plaintiff), seeking relief against each of twenty-one named defendants, for statutory treble damages, an injunction, and an accounting; and the defendants answered. By reason of dismissals, voluntary or by decision of the court, there are now eighty-seven plaintiffs and six defendants remaining on the *Rohlfing* case (R. 8).

In the *Shaffer* case, ten plaintiffs, who were wholesalers of shoe repair materials and related items, sued twenty defendants, who were either manufacturers or wholesalers of shoe repair materials and related items (R. 216). In the course of a series of motions nearly as long as in the other case, (the docket entries fill eighteen pages, R. 222-240) plaintiffs eventually filed their second amended complaint, consisting of nine counts, one for each plaintiff, against each of twenty-one defendants. By reason of various dismissals, there now remain in the *Shaffer* case six plaintiffs and six defendants, all of whom have answered (R. 216).

The second amended complaints in both cases, together with the answers, present a multitude of difficult and exceedingly complex issues of law and fact, at least some of which are common to both cases.

Both complaints allege violations of Section 1 of the Sherman Act: at the trial evidence will therefore be offered to prove on the one hand (and to deny on the

other) the existence of a conspiracy among the defendants to fix and maintain non-competitive prices, and to restrict marketing channels for shoe repair materials and related products within a defined market as well as to prove (and disprove) injury to, and the separate damages of each of the eighty-seven plaintiffs in one case and each of the six plaintiffs in the other. (R. 8, 216; Rohlfing complaint in Dist. Ct., R. 60-68; also 69-130; Answers R. 131-135; R. 136-140; R. 141-146; Shaffer complaint, R. 241-251; Answers R. 256-62; R. 262-268; R. 269-272).

Both complaints similarly allege, (and the answers deny) violations of Section 2 of the Sherman Act by reason of a claimed conspiracy by defendants to monopolize the sale of shoe repair materials. This forecasts evidence tending to establish (and rebut) conspiracy, monopoly in a defined market, and resulting injury and damage to each of the many separate plaintiffs. (R. 8, 216; Rohlfing complaint 60-68, also 69-130; Answers, R. 131-135; R. 136-140; R. 141-146; Shaffer complaint, R. 241-255; Answers R. 256-62; R. 262-268; R. 269-272).

More significant, both complaints allege violations of Section 2(a) of the Robinson-Patman Act, under which statute each plaintiff is required to establish his separate claim against each defendant—some six hundred separate claims of price discrimination, each necessarily proceeding on its individual basis. Defendants' answers deny illegality, and allege justification of price differences on the basis of manufacturing or delivery costs. (R. 9, 217; R. 261-2; R. 270-1; 266-267; R. 134-135; R. 138-140; R. 144-146) It was these Robinson-Patman act claims which led the various defendants to assert to Judge LaBuy in a brief filed in the *Rohlfing* case that it "will be next to impossible" to try the *Rohlfing* case. (R. 9; R. 201-209) Each plaintiff must undertake to establish a separate

law suit against each defendant by proving that each defendant sold goods of like grade and quality to others at discriminatory prices. The issues of discriminatory prices, "like grade or quality" and competitive effect are difficult enough; but since each defendant is justifying its conduct on the basis of cost justification, and the meeting of competitive prices, detailed proofs must be made from defendants' accounting records of all of its relevant sales transactions over the entire period covered by the complaint, and from defendant's related cost records, to say nothing of proof of allegedly relevant sales made by each of the various defendant's competitors. On these issues, the evidence will be of the accounting type—including myriads of selling transaction, details as to costs of manufacture, sale and delivery, on the basis of which will be erected the parties' ultimate contentions of price discrimination on the one hand, and of justification (of one kind or another) on the other. See *Rohlfing* complaint, par. 16, 17, 20, 21, (R. 66-68); Klinger ans., par. 19, 20, 23 (R. 134); Goldblatt answer, par. 16, 17, 20, 21, (R. 138, 139); Griffin answer, par. 16, 17, 20, 21 (R. 144); and for example of detailed accounting materials involved, see Howes Leather Co. answers to interrogatories, (R. 147-174); and Armour & Co., answers to interrogatories, (R. 174-200). And see Shaffer complaint, par. 16, 17, 24 (R. 248-249); Armour & Co. answer, par. 16, 17, 22 and Third Defense (R. 259-262); Griffin Mfg. Co. answer, par. 16, 17, 24 (R. 266-267); Grippo answer, par. 12, 16, R. 270-272; and for accounting detail, defendants' answers to certain interrogatories (R. 277-311).

Plaintiffs further allege in both cases a conspiracy in violation of Section 3 of the Robinson-Patman act in the granting and receiving of discriminatory rebates. (R. 8, 216; R. 61, 65-67; R. 242, 247-249). This adds additional factual and legal problems to the trial.

The various defendants in the trial court (including respondents here), in a brief filed with Judge LaBuy, themselves characterized the trial of the *Rohlfing* case as follows (R. 9-10; 201-209):

> *"Complexity of Trial.*
>
> It will be next to impossible for this Court to try this case, as the pleading now stands. The trial will be reminiscent of a 'battle Royal'. There are one hundred four (104) plaintiffs and ten (10) defendant manufacturers. Considered as a price discrimination case there are one thousand forty (1,040) separate, distinct and unrelated price discrimination claims in Count I. There may possibly be ten (10) in each Count from Count II through Count CV. Each plaintiff must show not only the price at which purchases were made from a manufacturer by a defendant department or chain store in competition with him, he must also show that he bought goods of a like grade and quality from the same seller at a higher price, and that the effect thereof was to 'substantially . . . lessen competition . . . or . . . prevent competition between him and such department or chain store.' . . . The trial would be *fantastically complicated.*" (emphasis by the authors of the brief).

While defendants' brief related to a prior (*i.e.* first amended) complaint, the second amended complaint on which the case will be tried dropped out only a single count, and still contained one hundred four counts.

With 87 plaintiffs and six defendants remaining in the *Rohlfing* case; and six plaintiffs and six defendants remaining in the *Shaffer* case, there will still be *558 separate Robinson-Patman Act controversies* to be heard and decided in the two cases.

During the pendency of these suits, lengthy discovery proceedings were instituted and were continuing. (R.

17-21; 30-57; 223-240). On February 23, 1955 these cases, which were approaching trial but which were still "below the line" (R. 17), were called before the District Court on the plaintiffs' request to reset them for trial to May, 1955 to permit the taking of further depositions (R. 17). At that time the court advised the parties of his congested calendar, suggested the possibility of referring the cases to a master to expedite their trial and advised counsel to appear in his chambers the following morning (R. 20-21). At that time he outlined the reasons (set forth below) which he felt required the referrals to a Master in Chancery (R. 7, f.f. and R. 215). The master set both cases for May 2, 1955 to permit the plaintiffs to finish the taking of certain depositions (R. 14). Plaintiffs then took sixteen depositions in California, Massachusetts and New York (R. 14).

Just before the hearings before the master were to commence, an oral motion was made by all parties to revoke the orders of reference, but for the sole reason that a subsequently added defendant had, two months and two days after the date of the reference to the master (R. 14, 57, first entry; 29), filed a jury demand. (R. 22, 24). Some days later, on May 6 (R. 57) the court sustained a motion to dismiss filed by the defendant who was demanding a jury, incidentally eliminating the jury trial question; and after the hearing of arguments (R. 57), and consideration by the court, the oral motion to vacate the reference was denied (R. 14, 15; 57). The petitions for writ of mandamus were filed with the Court of Appeals shortly thereafter, on May 26, 1955. (R. 1-5; R. 210-214).

Reasons for the Referrals.

The answers of the Trial Judge, in response to the petitions for the writ of mandamus, set forth the facts and reasons which necessitated these references—facts

and reasons which were stated to the parties in the judge's chambers at the time (R. 7-15; 215-219), and which may be summarized as follows:

1. The cases are complicated and complex, involving multiple plaintiffs and defendants, and place in issue difficult questions of law and fact concerning claims of violations of Sections 1 and 2 of the Sherman Act and Sections 2 and 3 of the Robinson-Patman Act (R. 7-11; 215-218).

2. The cases will require a detailed accounting analysis, including the examination of a very large number of transactions (R. 10-11; 218).

3. The demands of the parties for an early trial date upon completion of the pre-trial discovery (R. 13; 218).

4. The congested nature of the Court's calendar, which made impossible any early trial before the Court (R. 11-13; 218).

5. The great length of time required to conduct these trials (R. 13); and

6. The further length of time required to analyze the evidence and prepare opinions (R. 13).

The District Judge states in his answers to the petitions for mandamus that all of these facts, considered together, constitute an "exceptional condition" within the meaning of Rule 53(b) of the Federal Rules of Civil Procedure, requiring, in the opinion of the trial Judge, in the exercise of his "best judgment and discretion," that these cases be referred to a Master (R. 7-215).

The underlying facts concerning the complexity of the cases and the accounting type evidence needed to establish liability have already been set forth.

As to the other points the record shows:

a. Demands for Early Trial.

Both parties were demanding trial immediately upon completion of the discovery and depositions, which they expected to be completed by May, 1955. (R. 13; 16-21).

b. Length of the Trials.

The court concluded the cases would require *at least* two full months to try (R. 13); the plaintiffs orally estimated "probably six weeks" (R. 18); defendants had claimed it would take plaintiff two months (R. 18) to present plaintiff's case.

The court further concluded that it would take another two months for him to draw conclusions from the evidence and prepare his decision (R. 13).

c. Congestion of the Court's Calendar.

In making the references, Judge LaBuy stated to the parties: ". . . that the cases were very complicated and complex, that they would necessarily take considerable time to try; that my calendar was congested with many cases long delayed on account of my engagement in a number of very long trials, the most recent of which was the case of *United States* v. *DuPont, et al.*; that following this long trial I had the longest civil calendar of any judge in the district, and that while I was making rapid progress in reducing the congestion, it would be unfair to the litigants clamoring for trial in other cases, many of which could be tried in a few hours or a few days, were I to again become involved in a protracted trial." (R. 6). The judge had other cases already actually scheduled for trial for every day from then (February) up until the beginning of the summer recess (July). (R. 13). The number of extremely complicated and time consuming

cases which Judge LaBuy had heard as Trial Judge had been very burdensome, and had resulted in unavoidable delay in the trial of other cases. (R. 12) A chart (R. 12) tabulates these long cases, and the number of actual trial days consumed by these long trials (exclusive of hearings on motions, consideration of briefs, review of transcripts of testimony and exhibits, and preparation of opinions). The longest and most recent of these was the case of *United States* v. *DuPont* (now on review in this Court) which remained on trial before Judge LaBuy for practically one year solid, from November, 1952 up to the end of December, 1953, consuming 101 actual trial days (R. 12). This almost interminable trial was the principal cause of the heavy congestion still existing in Judge LaBuy's calendar a year later.

The Judge alleged that ". . . . the abnormal number of 'big' cases assigned to me has resulted in a very serious congestion of my trial calendar . . ." (R. 12) In April, 1955 Judge LaBuy had pending on his docket 871 cases, consisting of 312 civil cases, 66 criminal cases and 495 bankruptcy cases. (R. 11) Only one other judge assigned to the Northern District of Illinois had a greater number of cases pending; and no judge had as many criminal cases pending (R. 11).

No Evasion of Rule 53(b).

Despite the trial congestion faced by Judge LaBuy, the record shows that during the last 6 years (and exclusive of the two cases here involved), Judge LaBuy had referred only approximately nine cases to a Master in Chancery, four of which were hearings on limited issues only. (Ans. par. 18, R. 12, R. 218)

Decision of the Court of Appeals.

On the foregoing record, the majority of the Court of Appeals ordered that the writ of mandamus issue, directing respondent to vacate the two orders of reference, and directing that said cases be tried in due course in the United States District Court. (R. 331-2). The majority opinion by Judge Lindley stated that Judge LaBuy's orders were "erroneous" and constituted an "abuse of discretion." Judge Major, dissenting, observed that "If reference is to be outlawed, it should be by legislation or Supreme Court rule, rather than by decision of this court", and also stating: "In my opinion, there was no abuse of discretion by respondent, but the issuance of the writ will constitute an abuse of discretion by this court. The shoe is to be placed on the wrong foot."

SUMMARY OF ARGUMENT.

I.

The orders of reference were authorized by rule 53(b) F.R.C.P. A rule providing for an exceptional course means that occasionally at least that course may be followed. By the terms of the rule: references are not limited to matters of account; references may be made (Rule 53(e)(4)) against the objection of the parties.

Rule 53 is substantially former Equity Rule 59, in effect since 1912, and decisions under that rule are relevant. In one draft of Rule 53 (then Rule 58) proposed in 1936 "exceptional condition" was defined to mean a congested docket. While the language was later broadened, this draft shows that a congested docket was one of the "exceptional conditions".

The lower courts (District and Courts of Appeal) have since 1912 rather uniformly interpreted "exceptional con-

dition" to include very complex cases which the court is quite unable to try at any early time, because of docket congestion; however, this must never become a pretext to evade the rule. The decisions of this Court have been to the same effect; and this Court has interfered with references where the Judges of a District acted in concert to evade the rule.

The decision of the court below virtually nullifies Rule 53(b) in non-jury cases. This Court should give the rule an interpretation which, while keeping references "the exception and not the rule", will permit the trial courts to make reasonable references when actually necessary to get their judicial business done.

II.

Whether or not the orders of reference were actually erroneous, they were within the jurisdiction of the lower court, and the Court of Appeals erred in ordering the writs of mandamus to issue. The powers of the Court of Appeals are governed strictly by Act of Congress. Sections 1291 and 1292 of the Judicial Code restrict review of interlocutory orders by Courts of Appeal; the orders in question are not the type of interlocutory orders which, under the statute, the Court of Appeals may review.

Review of such unreviewable interlocutory orders by Courts of Appeal by mandamus has been consistently condemned by this Court (as well as by Courts of Appeal of the First and Eighth and other Circuits) except where necessary to confine the lower court to its jurisdiction,

or to compel it to exercise its jurisdiction, or protect the Court of Appeal's right to ultimate review.

Here the District Court was acting within its jurisdiction, and the Seventh Circuit's right to review its final decree is not threatened. None of the special reasons justifying review by Courts of Appeal of interlocutory orders by mandamus are here present; the Court of Appeals directed the orders expunged merely because a majority considered the orders to have been erronous. This type of piece-meal review is contrary to the policy laid down by Congress; the Court of Appeals orders should be reversed.

ARGUMENT.

I.

The Orders of Reference Were Authorized by Rule 53(b) of the Federal Rules of Civil Procedure.

Rule 53(b) of the Federal Rules of Civil Procedure provides:

> "A reference to a Master shall be the exception and not the rule . . . in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

From this language, and from a consideration of Rule 53 in its entirety, it is clear that Masters in Chancery are authorized as aids to the courts, to enable the courts to get their judicial business done. Masters in Chancery are not abolished, but are authorized, by the rule.

Furthermore, while references "shall be the exception and not the rule," it is clear that, whenever the exceptional situation arises, the trial judge is authorized to make the reference. As the Court of Appeals for the Second Circuit has said in *Helene Curtis Industries, Inc.* v. *Sales Affiliates,* 199 Fed. 2d 732, 733 (1952):

> "* * * the very existence of a rule providing for an exceptional course means that occasionally at least that course may be followed."

The question presented is as to the meaning of the words "some exceptional condition requires". What exceptional conditions?

First, it cannot mean merely "matters of account", for these are separately provided for in the rule. The "exceptional condition" necessarily refers to something else.

Second, it cannot, (as the majority below seemed to feel) mean cases where the parties ask for or agree to the reference. It is clear from Rule 53 as a whole that references are authorized without the consent of the parties. Rule 53(e)(4) provides: "The effect of a master's report is the same *whether or not the parties have consented to the reference* * * *" (Emphasis ours). These words necessarily contemplate references, even over the objection of the parties. We must look further for the meaning of these words.

1. The Derivation of Rule 53(b)

The rule has been in its present form since 1938. However, it is very similar to Equity Rule 59, in effect since 1912, which read as follows:

> "Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it."

Former Equity Rule 46, presently Rule 43(a)(2) of the Federal Rules of Civil Procedure, provided in part,

> "In all trials in equity the testimony of a witness shall be taken orally in open court, except as otherwise provided by statute or rule."

Equity rules 46 and 59 were designed to alter the former equity practice in which little of the testimony was taken in open court and a reference to a master was usual and customary. *Los Angeles Brush Mfg. Corp.* v. *James,*

272 U.S. 701 (1927). In that case a defendant in a patent case which had been referred to a master, filed a mandamus petition with the United States Supreme Court asking that the order of reference be expunged, on the ground no "exceptional condition" existed. The lower court's order recited the need of the parties for an early trial, the "congestion of the court's calendar", "many other causes entitled to be first heard, including a large number of criminal cases * * *" The order also recited that this condition would continue "unless many of the patent causes, including this cause", could be referred to a master for hearing.

The Court discussed the origin and purpose of the two equity rules; the Court's belief in the value of the change made by the rules, and the Court's intention not to amend them. The Court said:

> "The reason given in the order for referring these cases to a special master is that there is congestion in the court's calendar and that there are many other cases entitled to be heard first, including a large number of criminal causes which should be preferred over civil causes as to the trial thereof, that other civil litigation has not been accorded a fair proportion of the time of the court, and that the condition will continue unless many of the patent cases, including this case, be disposed of by such a reference.
>
> "In view of the recitals of the order, we are not inclined to infer that there has been any deliberate abuse of the discretion in this matter, or to hold that there may not sometimes be such a congestion in the docket as to criminal cases as would justify a district judge in not literally complying with the requirements of the two rules in question. There has been an emergency, due to a lack of judges in some districts which we cannot ignore. We shall therefore deny leave to file this petition, but are content to

state our views on the general subject, with confidence that the District Judges will be advised how important we think these two rules are, and that we intend, so far as lies in our power, to make them reasonably effective for the purpose had in view of their adoption."

The Court also said that:

"Were it to find that the rules have been practically nullified by a district judge, or by a concert of action on the part of several district judges, it would not hesitate to restrain them."

In 1936 the Advisory Committee on Rules for Civil Procedure submitted its preliminary draft of proposed new rules. This draft contained a proposed Rule 58 reading as follows:

"Rule 58. Reference to a Master—Exceptional not Usual. A reference to a master shall be made only in exceptional cases. In actions which are to be tried by jury, such a reference shall be made only when the issues are complicated; in actions which are to be tried without a jury, save in matters of account, it shall be made only in case it appears that the court cannot otherwise give to its other business the attention and dispatch reasonably required."

The note to this proposed Rule 58 stated:

"Substantially Equity Rule 59 (Reference to Master —Exceptional, Not Usual) with 'exceptional condition' defined, and the rule extended to actions formerly legal. See *Ex Parte Peterson*, 258 U.S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920)."

The April 1937 report of the Advisory Committee on Rules for Civil Procedure renumbered Rule 58 to Rule 53(b) and amended it to its present form and wording. The Note was changed slightly to read:

"This is substantially Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex Parte Peterson*, 253 U.S. 300 . . . (1920)."

The final report of the Advisory Committee on the Rules for Civil Procedure, dated November 1937, did not make any changes in Rule 53(b) as proposed by the report of April 1937. The Supreme Court adopted Rule 53(b) as submitted by the Advisory Committee.

The words finally selected, "upon a showing that some exceptional condition requires it," are much broader than the words in proposed Rule 58, which would have limited references in non-jury cases to situations where a congested docket so required. The language of proposed Rule 58 was considered too limiting, and a broader and more indefinite phrase was adopted in order to achieve more flexibility in the rule, and confer a larger discretion upon the courts. However, this history of Rule 53(b) at least suggests that the draftsmen considered that a congested court calendar amounted to an "exceptional condition" justifying a reference to a master, whenever actually necessary to permit the court to get its work done.

2.

The Lower Courts Have Rather Uniformly Construed Equity Rule 59 and Present Rule 53(b) to Permit Trial Courts, in the Exercise of Discretion, to Refer to a Master Complex Cases Which the Court Itself Cannot Expeditiously Try Because of a Congested Docket.

We believe that every opinion interpreting these rules, (including even the majority opinion below) concedes that the trial judge exercises "discretion" in applying the rule, and in deciding when a reference is required.

The lower courts have furthermore rather uniformly held that a reference is justified where the court's docket is unusually crowded, and the matter is so complicated that it will require an extended hearing which the court is unable to give within a reasonable time.

District Court Cases:

Berlin v. *Evans,* 300 Fed. 677 (1924 D.C.E.D. Pa.) ("exceptional condition * * * the business of the court was extraordinarily congested * * * impracticable for either judge of this court to give the time necessary for the hearing * * *;") *Holt Mfg. Co.* v. *C. L. Best Gas Turbine Co.,* 245 Fed. 354 (1917 D.C.N.D. Calif.) (reference ordered upon motion of one party and over objection of other party because of extremely complex character of patent case, the Court saying: "* * * It is to be left to the discretionary power of the court to say what character of case shall be deemed exceptional * * *."); *Flanders* v. *Coleman,* 249 Fed. 757 (D.C. S.D. Georgia, 1918). ("It is to be presumed that the judge properly exercised his discretion in making the reference * * *"); *Bliss* v. *Anaconda Copper Mining Co.,* 167 Fed. 342, p. 347; *Ramsey* v. *Home Mortgage Co.* (D.C.E.D. N.C. 1931) 47 F. 2d 621, at pp. 627, 636; *Helene Curtis* v. *Sales Affiliates,* 105 F. Supp. 886, 906 (S.D.N.Y. 1952).

Circuit Courts of Appeals Cases:

Smith v. *Brown* (CCA 5th 1925), 3 F. 2d 926, (which approves the cases of *Flanders* v. *Coleman,* 249 Fed. 757, and *Holt Mfg. Co.* v. *Best Gas Turbine Co.* 245 Fed. 354, cited *supra*); *Neale, Inc.* v. *McCormick* (CCA—9th 1927) 19 F. 2d 320 (which refused to issue a writ of mandamus to expunge an order of reference, finding that in a given period fourteen patent cases had been heard

by the District Judges, and nineteen others had been referred; that the instant cases would require two weeks for trial, and that congested calendars prevented an early court trial); *P.R.R. No. 35*, 48 Fed. 2d 122 (CCA 2d 1931) (concerns admiralty rules, but follows cases on equity rules; the court concludes that the District Court had discretion "which we must assume to have been properly exercised until the contrary appears;" that the lower courts' "* * * power to refer troublesome issues depends, not upon his escape from the difficulties they raise, but because their trial will take a long time. If so, we cannot see why crowded dockets do not come within the same excuse. Suits must somehow be decided and delay may be nearly as bad as no decision at all * * *. We agree, of course, that if it appeared that they used the practice merely as a fetch to evade the rule, we should be called upon to intervene * * *"); *Troyak* v. *Enos*, 204 F. 2d 536 (CA 7, 1953) (Suit for breach of trust against trustee; reference proper because of "exceptional circumstances", *i.e.*, some witnesses were out of jurisdiction; case was "broad and complex . . . Three hundred exhibits were offered . . . hearing of parol evidence required some six days"; the judge had retired, was sitting only until his successor should be appointed).

3.

Prior Decisions of This Court.

We have already discussed (*supra*, p. 18-20) the case of *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, which construed the equity rules, concluding that the trial judge's recital of docket congestion was sufficient to sustain his order of reference in a patent case, but warning the courts that the rules must be followed.

This Court had previously, in 1920, in the case of *Ex Parte Peterson*, 253 U.S. 300, refused to issue a writ of mandamus to compel a trial judge to vacate an order of limited reference in a case at law. In this opinion, which was rendered some eight years after the adoption of Equity Rule 59, this Court said (p. 314): "The inherent power of the court to invoke such aid" (*i.e.*, of a Master) "is the same whether the court sits in equity or at law." The court discussed the problem as follows:

> "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. Compare *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Massachusetts 80, 87-90. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our Government, it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon; these are among the purposes for which such aids to the judges have been appointed. *Kimberly* v. *Arms*, 129 U.S. 512, 523. *Whether such aid shall be sought is ordinarily within the discretion of the trial judge;* but this court has indicated that where accounts are complex and intricate, or the documents and other evidence voluminous, or where extensive computations are to be made, it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself." (Emphasis ours.)

The decision of the Court of Appeals below, and the opinions of both the majority and dissenting judges, were based on their respective interpretations of *McCullough* v. *Cosgrave*, 309 U.S. 634 (1940). This brief *per curiam* opinion of this Court, citing only *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, does not explain why this Court issued the writ of mandamus to vacate the district court's order of reference. The majority below, concentrating on the recitals of the order of reference expunged by McCullough, concluded that congestion of dockets and the complex nature of the case referred can *never* justify a reference. The dissenting judge, concentrating on facts alleged in McCullough's petition for mandamus, (which asserted that the Judges of that particular district had adopted a rule or practice of generally referring all patent infringement cases to Masters for trial, regardless of the nature of the cases or other considerations) concluded that the reference was vacated by this Court in McCullough because the rules had been "practically nullified by a district judge, or by a concert of action on the part of several district judges. . . . "

A later opinion of this court, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943), refers to and explains the *McCullough* v. *Cosgrave* ruling as follows:

> "Hence there are in this case no special circumstances which would justify the issuance of the writ, such as the persistent disregard of the Rules of Civil Procedure prescribed by this Court, found in *McCullough* v. *Cosgrave*, 309 U.S. 634 (see *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706-8); . . . "

Text writers have taken this same view of the *McCullough* v. *Cosgrave* ruling; *Stern and Gressman, Supreme Court Practice*, 2nd edition 1954, say at p. 281: "See *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706,

and *McCullough* v. *Cosgrave*, 309 U.S. 634 (Mandamus issued to prevent district court from continually referring patent cases to a master in violation of Supreme Court Equity Rules, although courts may in their discretion refer some cases to masters)."

We believe that the dissenting judge correctly understood this Court's holding in the *McCullough* v. *Cosgrave* case; he said "References as was done in *McCullough* . . . in accordance with or by reason of a plan, practice or custom, constitutes an abdication of the judicial function. It is the very antithesis of the exercise of judicial discretion."

If this is the meaning of *McCullough*, that case does not apply here. Petitioner, Judge LaBuy, with a very crowded docket, had referred only nine cases in six years; his reference of these two cases was based on a specific consideration of the problems presented by those cases against the background of his crowded docket. In making this reference, he exercised a sound discretion.

The purpose of Masters, we assume, is to assist the courts by hearing matters (such as accounts) which are time-consuming and replete with detail, and which the Master can in all probability hear and digest in a report for the judge, thereby reducing the issues and the scope of the matters which the judge will eventually have to consider. Properly employed, this can save much time for the judge.

The present cases are certainly appropriate for a master to hear on this basis. The master can hear and record the terrific amount of detailed accounting evidence necessary to support plaintiffs' some six hundred separate claims, and condense this into a report for the

judge, with appropriate conclusions and recommendations. It is probable that by the time the evidence has been received, and the Master's report filed, many of the claims will be either wholly unsupported by evidence, or on the other hand conceded, so that the work of the judge will be much less than if he had been required to hear the entire matter. Instead of four months, the matter may be considered and decided in one or two weeks, enabling the judge to catch up on other matters. If any cases are because of their nature appropriate under Rule 53(b) for reference, these are such cases. In so deciding Judge LaBuy exercised a sound discretion, and his considered action should not have been arbitrarily ordered vacated.

It will be time enough to restrain a district judge by mandamus, if he should use his crowded docket "as a fetch to evade the rule," as Judge Learned Hand said in *P.R.R. No. 35*, 48 F. 2d 122. The record in this case utterly refutes any such charge or suspicion.

4.

Other Cases Cited by the Majority of the Court Below.

The court below relied primarily on its own interpretation of *McCullough* v. *Cosgrave*.

At the same time it rejected *Neale* v. *McCormick*, 19 F. 2d 320 (CCA 9, 1927) saying: "We think this case cannot be reconciled with either the *James* case or the *McCullough* case, and find ourselves unable to accept the postulate upon which this decision rests." In *Neale* v. *McCormick* a writ of mandamus was sought against two district judges, to compel vacation of an order of reference in a patent case. The court of appeals made findings as to the number of patent cases heard in a given period

of time by the judges, compared with the number of patent cases referred by them to masters; concluded there was no policy of referring all patent cases to masters as charged; found the judge's dockets were crowded, that the case referred would take considerable time to hear, that these facts constituted exceptional conditions, and denied the writ, citing as authority only the *James* case. Certiorari was applied for and denied (*Neale* v. *McCormick*, 275 U.S. 530; 48 Sup. Ct. 28; 72 L. Ed. 409). While we are aware that denial of *certiorari* does not reach the merits, it seems that the writ would have been awarded if (as the court below believed) the lower court's decision was impossible to reconcile with the only case it cited, the then recently decided *James* case.

U. S. v. *Kirkpatrick*, 186 Fed. 2d 393 (3rd Circuit 1950), relied on by the majority below, condemned a practice of the district courts in referring all admiralty cases " . . . solely pursuant to a plan for the trial of admiralty cases generally by commissioners . . . " and not because of any circumstance peculiar to the cases referred. This doctrine is inapplicable here, since there is no charge here that petitioner, Judge LaBuy, ever referred his cases by "categories".

The ruling of the court below, for all practical purposes, forecloses all references in non-jury cases except for "matters of account". This is a virtual nullification of the rule, and deprives the lower courts of assistance that is, in exceptional cases, actually granted them by rule. We respectfully ask this Court to give an appropriate construction of Rule 53(b) for the guidance of lower courts—a construction which will permit the lower courts to get their urgent work done.

II.

Whether or Not the Orders of the District Court Were Erroneous, the Court of Appeals Erred in Ordering the Writs of Mandamus to Issue.

Assuming, for the purpose of this argument only, that petitioner, Judge LaBuy, was in error in referring the two cases in question to the master, nevertheless the Court of Appeals should have refused to permit the filing of the petitions for *mandamus;* or, having permitted such filing, should have refused to issue the writs.

The Constitution of the United States defines federal judicial power in general terms; confers on the Supreme Court certain original jurisdiction; and then provides: "In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U. S. Constitution, Art. III, Sec. 2.

The Court of Appeals is created wholly by statute, and has only appellate jurisdiction.

In the use of mandamus directed to a lower federal court, the Supreme court is exercising appellate jurisdiction, and in this is subject to control of Congress. *Ex Parte Pennsylvania Company,* 137 U.S. 451; 11 Sup. Ct. 141 (1890); *Ex Parte Harding,* 219 U.S. 363; 31 Sup. Ct. 324.

Prior to 1948, and without substantial change for over 150 years, there were two separate statutes conferring on the Supreme Court the power to issue writs of mandamus; but only the second of these applied to the lower federal courts.

The first statute (known for a number of years prior to 1948 as Section 342) provided:

> "The Supreme Court shall have the power to issue . . . Writs of Mandamus, in cases warranted by the principles and usages of law . . ."

The second statute (known for a number of years prior to 1948 as Section 377) provided:

> ". . . The Supreme Court, Circuit Court of Appeals and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary to exercise their respective jurisdictions, and agreeable to the usages and principles of law."

This second statute was known as the All Writs Act.

In 1948 the Judicial Code was entirely revised, Section 342 was repealed, and the all-writs act was retained, in the following words, as Section 1651(a):

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Thus in considering cases governing mandamus, it is important to consider that (a) the review of lower court orders by either the Supreme Court or the Court of Appeals is subject to regulation by Statute; (b) prior to 1948 the Supreme Court could issue writs of mandamus either under the broad provisions of Section 342 or the more limited provisions (in aid of jurisdiction) of Section 377; (c) The Court of Appeals was always limited to issuance of writs of mandamus in aid of its jurisdiction; (d) since 1948 both courts are governed by the same statute, Sec. 1651(a).

However, the Supreme Court's power to issue writs of mandamus under Sec. 1651(a) is still broader than the

power of the court of appeals; *Moore's Judicial Code*, 1949, observes (p. 597):

> "In reference to the Supreme Court the section has greater scope: (a) for, although Sec. 1651 cannot enlarge the court's original jurisdiction it can nevertheless operate in aid thereof; and (b) because the Supreme Court's appellate jurisdiction is more extensive than that of the court of appeals and because the Court has final supervisory power over the federal judicial system."

In this case we are considering the propriety of two judgments of the Court of Appeals ordering the issuance of writs of mandamus in the year 1955.

It is obvious from its opinion in this case that the Court of Appeals considers that it has the right under Sec. 1651(a) to correct erroneous interlocutory orders of the trial courts in advance of final decision whenever, in its discretion, it feels so inclined.

However, Congress has strictly limited the review by the Court of Appeals of interlocutory orders by Sections 1291 and 1292 of the Judicial Code; and the interlocutory orders (of reference) entered by Judge LaBuy were not the kind of interlocutory orders which are reviewable by the Court of Appeals. The regulation of interlocutory appeals is important, since unauthorized interlocutory appeals serve largely to delay litigations by piecemeal trials and appeals.

The review, by mandamus, of Judge LaBuy's orders was appellate; and this constituted the unlawful review of an interlocutory appeal contrary to the direction of Congress.

a. Court of Appeals Decisions.

The best view seems to be that interlocutory orders may be reviewed by the Courts of Appeals by mandamus, only if the Court of Appeal's right to review the case later by appeal would otherwise be frustrated.

This is the view held in the First Circuit; that review of an interlocutory order by mandamus will be granted if otherwise no review by the Court of Appeals of the ultimate final order could be had; but will be denied if the case will reach the Court of Appeals after final decree. *In re Narragansett Pier Amusement Corp.*, 224 F. 2d 231; *In re Josephson*, 218 F. 2d 174, in which latter case the careful reasoning of the court is completely set forth. Thus in the former case, the Court of Appeals of the First Circuit refused to review by mandamus an interlocutory order referring cases to a master, since it could review the entire case after final decree; but in the latter case it reviewed by mandamus an interlocutory order sending a case to *another Circuit* for trial, since this order would prevent all review by the Court of Appeals of the First Circuit.

However, the Seventh Circuit refuses to follow this doctrine, and reviews interlocutory orders by mandamus whenever it feels special circumstances so warrant,—construing the all-writs act as conferring on it a "roving commission" to supervise interlocutory orders of the district courts in advance of final decision. This view seems to undermine completely the statutes of Congress limiting interlocutory appeals to certain types of interlocutory orders only.

The views of the Seventh Circuit are also contrary to the Eighth Circuit. *Carr* v. *Donohoe*, 201 Fed. 2d 426 (CA 8, 1953); *Hydraulic Press Mfg. Co.* v. *Moore*, 185

Fed. 2d 800 (CA 8, 1950). And the practical reasons for denying review of such interlocutory orders by mandamus are eloquently set forth by Judge Goodrich of the Third Circuit in *All States Freight, Inc.* v. *Modarelli*, 196 Fed. (2) 1010 (CA 3, 1952).

Other court of appeals decisions on the point are set forth and briefly discussed in your petitioner's Petition for Certiorari p. 9-12.

b. Supreme Court Decisions Defining Court of Appeals Right to Review Interlocutory Orders of Trial Court by Mandamus.

The issuance of the writs of mandamus by the court below in the present cases is erroneous under recent decisions of this Court considering the power of the Court of Appeals to issue writs of mandamus to review interlocutory orders of trial courts.

In *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 63 Sup. Ct. 938 (1943) Mr. Chief Justice Stone stated (p. 22): "The question for decision is whether the Circuit Court of Appeals below rightly issued its writ of mandamus to the district court to correct that court's alleged error in striking respondents' pleas in abatement to a criminal indictment."

After setting forth the provisions of the All Writs Act, the court stated petitioner's contentions as follows (p. 25): "They argue that as the district court's order striking the pleas in abatement was an exercise of its jurisdiction, its action is reviewable only on appeal and not by mandamus, and that since by Congressional enactment and policy appellate review of the district court's order may be had only on review of a final judgment of conviction, that legislation and policy are not to be circumvented by resort to mandamus.

"We are of opinion that in the circumstances of this case these are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ."

In holding that the Court of Appeals committed error in issuing the writ of mandamus to correct the interlocutory order of the lower court, this Court stressed the fact that ". . . the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute. . . ." The court pointed out that the traditional use of mandamus ". . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." (p. 26)

The following statement of the Supreme Court applies to the present case. (p. 26): "But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants, and of the subject matter . . . is not questioned."

The Court concluded (p. 29):

> "Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C. Sect. 225(a), 28 U.S.C.A. Sect. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspond-

ingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion."

In *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 74 Sup. Ct. 145 (1953), the refusal of a circuit court of appeals to review by mandamus a district court order changing venue from the Southern District of Florida to the Northern District of Georgia was reviewed by the United States Supreme Court on Certiorari, and affirmed. Since the district court admittedly had jurisdiction of the subject matter of the suit and of the parties, this interlocutory ruling was held not reviewable by mandamus. The Court said (p. 382) that the lower court's

". . . decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power . . . and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piece-meal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power . . ."

The court specifically refused to consider pleas of inconvenience and hardship occasioned by the appeal being delayed until after final judgment.

In *Parr* v. *United States,* 72 Sup. Ct. 912, (June 11, 1956) where the Supreme Court refused to grant certiorari to review on behalf of the defendant a certain interlocutory order of dismissal, it also held that writs of mandamus and prohibition should not be issued to expunge the order for the following reasons:

> "We think that extraordinary writs should not issue. Such writs may go only in aid of appellate jurisdiction. 28 U.S.C. Sect. 1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper,* 270 U.S. 9, 29-30. Here the most that could be claimed is that the District Courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn., supra,* at p. 30."

In the present case the District Court admittedly had jurisdiction of the parties and of the subject matter of the suits. It had the right under Rule 53(b) to determine whether it should try or refer to a Master the cases before it. Its decision, right or wrong, is an interlocutory decision not reviewable by the Court of Appeals under the All Writs Act.

In arriving at the conclusions he did, the District Judge considered the factors which he was required to consider under the rule and the cases construing it; he did not abuse his discretion or usurp judicial power. The dissenting judge in the court below was correct in stating:

> "The majority opinion asserts that respondent in entering the order of reference abused his discretion. No reason is assigned, however, for such holding other than that respondent made an erroneous ruling. But that is not sufficient, as is shown by statements from *Roche* and *Bankers Life, supra.* In fact, respondent in entering the order under attack had at least as wide a discretion as this court has in deciding whether the writ should issue. In my opinion, there was no abuse of discretion by respondent, but the issuance of the writ will constitute an abuse of discretion by this court. The shoe is to be placed on the wrong foot."

The judgments of the Court of Appeals directing that the writs of mandamus should issue, should be reversed.

CONCLUSION.

The judgments of the Court of Appeals, that writs of mandamus should issue against petitioner, are erroneous. Petitioner prays that the judgments of the Court of Appeals be reversed, and remanded to the Court of Appeals with directions to dismiss the petitions for mandamus.

Respectfully submitted,

THE HONORABLE WALTER J. LABUY,
UNITED STATES DISTRICT JUDGE,
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